No. 76-1193

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

ESTELLE JACOBS, A/K/A "MRS. KRAMER"

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CITATIONS

229-559—77——1

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on remand (App. A, *infra*) is not yet reported. The original opinion of the court of appeals (App. B, *infra*) is reported at 531 F. 2d 87. The opinion of the district court (App. E, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1976. On January 21, 1977, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including February 28,

1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court of appeals possesses and should exercise supervisory power to suppress a defendant's allegedly perjurious grand jury testimony for the sole reason that the prosecutor neglected to follow the usual practice of other federal prosecutors in the circuit of giving "target warnings" to grand jury witnesses against whom the government has incriminating evidence.

STATEMENT

1. During May 1973, in the course of her employment by a debt collection agency, respondent made numerous telephone calls to various relatives of a delinquent gambling debtor she was attempting to locate.[1] Without her knowledge the debtor's brother tape-recorded a call during which she allegedly threatened the debtor with physical harm if he did not pay up (App. B, *infra*, p. 16A). On September 13, 1973, agents of the Federal Bureau of Investigation, after giving respondent full *Miranda* warnings and observing her sign a waiver of rights form, questioned her about the call. They did not tell her that it had been recorded, and she denied making any threats (*id.* at 16A–17A).

[1] See page D-27 of the Appendix to the government's brief in the court of appeals. Appendices D and E of that document consist of the Grand Jury Minutes of respondent's testimony. Further reference to that testimony will be designated "Grand Jury Minutes—." We are lodging a copy of the Appendix with the Clerk of this Court.

Some nine months later the government subpoenaed respondent to appear before a grand jury sitting in the Eastern District of New York and there questioned her about her employer's business in general and the role she played in it. Again she was not told about the recording (*id.* at 17A). She denied unequivocally having made certain statements that the government attorney read to her from a transcript of the recorded

NOTE: Reference to Footnote [1] on Following Page.

[1] Respondent often identified herself over the telephone as "Mrs. Kramer" (Grand Jury Minutes D–2). The pertinent testimony was as follows (*id.* at D–39 to D–41):

Q. I'm going to read some direct quotes to you, Mrs. Jacobs, and I want to know whether or not you said them!

"Mrs. KRAMER. Well, you know what's going to happen to him one of these days.

BILL. Well, he's going to die ["he" refers to the debtor, who by then was known to be suffering from leukemia] and now that's besides the point.

Mrs. KRAMER. Sooner than he expects.

BILL. No, I don't.

Mrs. KRAMER. Sooner than he expects. Maybe it's going to be painful to be honest with you."

A. I never said that.

Q. Are you absolutely positive that you never said that!

A. Absolutely positive.

Q. Now, you're under oath—

A. I never said that.

Q. You never said to anyone these words, "Maybe it's going to be painful, to be honest with you."

A. I never said it. I know I'm under oath.

Q. Now, did you know the statute of perjury!

A. Yes. I never said that.

Q. We'll continue.

"BILL. Well, you know it's got nothing to do with me.

Mrs. KRAMER. I mean it's really a shame, but he's gonna get his pretty soon, just a matter of hours to be honest with you and as

conversation,[3] and the grand jury indicted her for perjury[4] (*ibid.*).

Prior to her grand jury testimony the government had advised respondent of her Fifth Amendment privilege against self-incrimination and told her that she had a right to have counsel of her choice outside the grand jury room and to consult with him or her at any time (Grand Jury Minutes D–3 to D–4; App. E, *infra*, pp. 27A–28A, n. 2). She had not been given the full litany of *Miranda* warnings to which individuals facing custodial interrogation are entitled,[4] nor had she been told that she was a "target" of the grand jury investigation subject to indictment. She had been advised, however, that perjury was a serious offense (*ibid.*), and before testifying she had sworn that her testimony would be truthful (Grand Jury Minutes D–2).

I told you, I'm being honest with you. We didn't like going to the mother, but we will.

BILL. Well, you know."

Q. (continuing) Do you recognize those words?

A. Not exactly.

Q. You had some sort of conversation?

A. By the way of saying I wish you could contact your brother.

Q. Did you say, "What's he's going to get his pretty soon"?

A. I did not.

Q. You absolutely deny that statement?

A. Yes. I deny it.

[3] Respondent was also indicted for transmitting in interstate commerce a threat to injure, in violation of 18 U.S.C. 875(c). That count is not involved here.

[4] The government had not told respondent either that she had a right to remain silent before the grand jury or that counsel would be provided for her if she were unable to bear the expense herself. Respondent was unrepresented at the time of her testimony; she stated that she was not in need of counsel (Grand Jury Minutes D–4; App. E, *infra*, pp. 27A–28A, n. 2), and she was advised that she could stop the grand jury proceedings to consult with counsel whenever she wanted (*ibid.*).

2. Before trial, respondent moved to suppress her grand jury testimony on the ground that the government's warnings to her had been inadequate. The district court granted the motion, relying on *United States* v. *Mandujano*, 496 F.2d 1050 (C.A. 5), reversed, 425 U.S. 564, and *United States* v. *Washington*, 328 A.2d 98 (D.C. Ct. App.), certiorari granted, 426 U.S. 905, argued December 6, 1976 (No. 74–1106). The court ruled that the government's questioning of respondent, without first giving her full *Miranda* warnings and advising her that she was a "putative defendant," was "so 'offensive to the common fundamental ideas of fairness' as to amount to a denial of due process" (App. E, *infra*, p. 31A). Without her grand jury testimony the government was unable to prosecute the perjury charge, and the district court accordingly dismissed it (*id.* at 31A–32A).

The court of appeals affirmed, although for different reasons. It expressly declined to reach the constitutional issues that had been argued both in the district court and on appeal (App. B, *infra*, pp. 19A, 21A), and ruled instead, "solely under our supervisory power" (*id.* at 22A), that suppression was necessary because the government's failure to give a "target warning" in this case departed from prevailing, circuit-wide prosecutorial practice and created what the court believed to be an intolerable lack of "uniformity

in criminal procedure within the circuit" (*ibid.*).[5] In the court's view (*id.* at 21A), the government's conduct in this case, "if not in actual violation of the Constitution, is, at least, outside the penumbra of fair play."

3. On November 1, 1976, this Court granted the government's petition for a writ of certiorari (No. 75–1883), vacated the judgment of the court of appeals, and remanded for reconsideration in light of the intervening decision in *United States* v. *Mandujano*, *supra*.

On remand, the court of appeals adhered to its decision. It said (App. A, *infra*, pp. 3A–4A) that it had anticipated (and agreed with) this Court's ruling in *Mandujano* and that its own ruling had not been based on constitutional grounds, but on its conception of its "duty to avoid uneven justice in the circuit, resulting from [the government's] mere negligence or inattention to established practice and guidelines" (*id.* at 6A).[6] The court acknowledged (*ibid.*) that the government could legitimately achieve uniformity by adopting a practice of never giving target warnings in any case, but it determined (*ibid.*) that, since "the policy of the various prosecutors should be uniform," and since "[i]t is an important function of the administration of criminal justice to let our citizens know that equal justice is available to all" (*ibid.*), the "sanction of suppression is salutary in the circumstances" (*id.* at 8A). The court further explained (*id.* at 13A) that it was imposing that sanction for a "didactic purpose," and to prevent "chaos in criminal law administration through the presence in the same district of a two-headed prosecution branch operating on conflicting procedures" (*id.* at 12A). The sanction was especially appropriate, in the court's view (*id.* at 7A), because respondent remained subject to prosecution for the substantive offense (see note 3, *supra*); in these circumstances the government "was [not] entitled to the luxury of a perjury count" (*id.* at 7A).

In addition, the court of appeals rejected the government's arguments that its exercise of supervisory powers to suppress respondent's testimony (1) was barred by 18 U.S.C. 3501(a) or Rule 402 of the Federal Rules of Evidence, and (2) conflicted with decisions of the Third Circuit regarding the effect of

[5] Upon learning that the government attorney who had questioned respondent before the grand jury—a "Strike Force" attorney—had not told her that she was a "target" of the investigation, the court had directed its clerk to poll the six United States Attorneys in the Second Circuit to learn their practice in this regard. Each replied that they customarily warn grand jury witnesses who are "putative defendants" of their status. This survey indicated to the court that respondent would have been warned that she was a "putative defendant" if she had been subpoenaed by the United States Attorney, yet "the Strike Force operating in the same district failed to give her such warning" (App. B, *infra*, p. 21A).

[6] The guidelines to which the court referred are those promulgated by the Attorney General to govern the relationship between Strike Force attorneys (who operate under a commission from the Attorney General issued pursuant to 28 U.S.C. 515(a)) and United States Attorneys. Those guidelines provide generally that in grand jury proceedings the former "shall * * * operate under the direction of the" latter (see Office of the Attorney General, Order No. 431–70, reprinted in *In re Persico*, 522 F.2d 41, 68–71 (C.A. 2)). The guidelines do not require (or even mention) target warnings.

Section 3501(a) on appellate courts' supervisory powers (*id.* at 10A–12A).

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the nature and scope of the federal courts' supervisory function. In our view the court of appeals in this case has exercised powers that it does not possess.[1] In so doing it has rendered a decision that produces a result forbidden by Congress and that conflicts with the decisions of another court of appeals.

Even without regard to the controlling legislation, however, the court's exercise of supervisory powers to suppress respondent's allegedly perjurious testimony raises grave questions, since none of her rights was violated either by the failure to give her a "target warning" (as the court itself recognized) or by the Strike Force attorney's departure from prevailing prosecutorial practices. There was no "unequal justice" in this case—the government's conduct observed all constitutional and statutory standards—and the courts are not at liberty to excuse violations of the criminal law because of displeasure over lawful governmental practices.

1. The power of the judiciary to formulate and apply rules of evidence is subordinate to the paramount authority of Congress, within constitutional limita-

[1] The court of appeals has in reality exercised two different kinds of power in reaching its decision in this case. The first is a power to regulate the conduct of government attorneys before the grand jury, the second a power to punish what it perceives as undesirable conduct by means of the suppression of a defendant's statements and—since in this case those statements constitute the *corpus delecti* of the alleged offense—by precluding the government from prosecuting a crime. In this petition we principally question the latter exercise of power.

tions, to declare what practices and procedures will govern trials in the federal courts. *E.g., Gordon* v. *United States,* 344 U.S. 414, 418; *Funk* v. *United States,* 290 U.S. 371, 382, 383. The principle was stated expressly in *Palermo* v. *United States,* 360 U.S. 343, 353, n. 11: "The power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress." See also *McNabb* v. *United States,* 318 U.S. 332, 341, n. 6.

We submit that two Acts of Congress stand in the way of the court of appeals' exercise of its claimed supervisory power[2] to suppress respondent's grand jury testimony in this case:

a. Section 3501(a) of Title 18 provides that in any criminal prosecution a confession, which is defined to include "any self-incriminating statement" (Section 3501(e)), "*shall* be admissible in evidence if it is voluntarily given" (emphasis added). The court of appeals ruled that this provision was inapplicable because, in its view (App. A, *infra,* pp. 10A–11A), respondent's perjurious denial of the threatening telephone call was not a "confession" or a "self-incriminating statement." But Section 3501 was enacted in response to this Court's decision in *Miranda* v. *Arizona,* 384 U.S. 436, which held that, absent

[2] The supervisory powers possessed by the lower federal courts can surely be no broader than the rulemaking authority of this Court, and no less subject to congressional limitation.

effective warnings regarding the Fifth Amendment privilege against self-incrimination, any statements made by an accused during custodial interrogation would be inadmissible at trial and (*id.* at 477) that "no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.'" The Court explained that "statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and * * * are incriminating in any meaningful sense of the word" (*ibid.*).

Had respondent's denial been given in response to custodial interrogation not preceded by the required warnings, it would have been excludable under *Miranda*. There is no reason why the very same statement should be considered "self-incriminating" for purposes of *Miranda*'s exclusionary rule but not "self-incriminating" for purposes of Section 3501's rule of admissibility.[9] Thus, absent a determination that re-

[9] Respondent's denials of guilt were not only perjurious but also evidence of her guilt on the substantive count, since false exculpatory statements are circumstantial evidence of guilty consciousness. See, *e.g.*, *United States* v. *Kahan*, 415 U.S. 239; *Wilson* v. *United States*, 162 U.S. 613, 620–621; *United States* v. *Parness*, 503 F. 2d 430, 438 (C.A. 2), certiorari denied, 419 U.S. 1105; *United States* v. *Merrill*, 484 F. 2d 168, 170 (C.A. 8), certiorari denied, 414 U.S. 1077; *United States* v. *Tager*, 481 F. 2d 97, 100 (C.A. 10), certiorari denied, 415 U.S. 914; *United States* v. *Lompres*, 474 F. 2d 860, 863 (C.A. 7), certiorari denied, 411 U.S. 965. If—as we think is clear—those statements would therefore be admissible as part of the government's proof of the substantive count, then we submit that they would be admissible on the perjury count as well.

spondent's testimony was not voluntarily given, Section 3501 governs, and the court of appeals had no power—supervisory or otherwise—to suppress it."[10]

b. Rule 402 of the Federal Rules of Evidence also restricts the courts' supervisory power to exclude evidence.[11] That rule provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

The legislative history of this provision shows that Congress chose its language with care: relevant evidence is to be excluded solely in those cases where exclusion is mandated "by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court *pur-*

[10] The court of appeals noted (App. A, infra, p. 11A) that Section 3501(b) instructs the district court in determining voluntariness to consider all of the circumstances surrounding the giving of any statement by the defendant, including whether the defendant at the time "knew the nature of the offense with which he was charged or * * * suspected." The court then said (*ibid.*): "There is no evidence that Mrs. Jacobs had such knowledge." We take this remark to be something other than a ruling by the court that respondent's allegedly perjurious denial was involuntary. Whether she knew the nature of the offenses of which she was suspected, and what effect the state of her knowledge may have had on the voluntariness of her grand jury testimony, were factual issues that were not raised or passed upon by the district court and that the court of appeals presumably was not attempting to resolve in the first instance.

[11] The Federal Rules of Evidence are an Act of Congress. Pub. L. 93–595, 88 Stat. 1926.

suant to statutory authority" (emphasis supplied).[12] See H.R. Rep. No. 93–650, 93d Cong., 1st Sess. (1973). Having strictly limited this Court's ability to fashion rules excluding otherwise relevant evidence, Congress plainly could not have intended to allow the courts of appeals an unfettered supervisory power to achieve the same result.[13]

In short, Section 3501(a) and Rule 402 strictly limit the circumstances under which relevant, voluntary statements made by a defendant (or anyone else) may be suppressed, leaving no room whatever for the exercise of inconsistent supervisory powers by the federal courts. In suppressing respondent's grand jury testimony without first finding a violation of the Constitution, an Act of Congress, or a rule formulated

[12] For example, under 18 U.S.C. 3771–3772, empowering this Court to promulgate the Federal Rules of Criminal Procedure.

[13] The court of appeals ruled that Section 402 does not preclude its result on the ground that it bars only "common law rules of evidence or state rules of evidence, if inconsistent [with the federal rules]" (App. A, *infra*, p. 11A) and was not addressed to inconsistent rules of evidence formulated by the courts of appeals acting pursuant to supervisory powers. The court did not explain the basis for this conclusion, and we submit that its reading of the rule is unpersuasive given the express restriction of this Court's power to act other than "pursuant to statutory authority."

The court of appeals was encouraged in its interpretation by the government's failure to present "history to support the view that Congress [in passing Section 402] was concerning itself with the supervisory powers of the federal courts" (*ibid.*), but no such history was needed in light of the plain language of the statute. In any event, we disagree with the court of appeals' implicit conclusion that, unless Congress clearly manifests an intent to restrict or nullify judicial supervisory powers, any statute that it passes to govern criminal practice in the federal courts can be disregarded in favor of an inconsistent exercise of such powers.

by this Court under its rulemaking authority, the court of appeals has acted pursuant to supervisory powers that it does not possess. The propriety of that action merits review by this Court.

2. Moreover, by invoking the court's supervisory powers and ignoring the directive contained in 18 U.S.C. 3501(a), the decision below conflicts with two decisions of the Third Circuit. In *United States* v. *Crook*, 502 F. 2d 1378 (C.A. 3), certiorari denied, 419 U.S. 1123, the court held that a defendant's voluntary waiver of counsel prior to questioning by federal agents who knew he was represented by counsel on pending, unrelated charges did not contravene *Massiah* v. *United States*, 377 U.S. 201. The court then considered and rejected the possible exercise of its supervisory powers to create a rule that would adopt the prohibition against interrogating a defendant in the absence of his counsel contained in the American Bar Association's Code of Professional Responsibility (DR 7–104(A)(1) (Final Draft, 1969)). The court noted (502 F. 2d at 1380) that the Code provisions were enforceable "only under our supervisory powers," which are "subject to the control of Congress." Since Congress had decreed that voluntary confessions shall be admitted, the court recognized its lack of authority to formulate an inconsistent evidentiary rule. "We cannot," said the court (*id.* at 1381), "in exercising merely supervisory powers, disregard the congressional mandate of 18 U.S.C. § 3501(a)."

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The court below attempted to distinguish *Crook* on the ground that the Third Circuit's holding that the defendant's constitutional rights had not been violated made the subsequent discussion of Section 3501 and its relation to judicial supervisory powers mere dictum (App. A, *infra*, pp. 11A–12A). But the court's description of *Crook* only highlights its resemblance to this case, where the court also found that respondent's statements were secured without violation of any of her constitutional rights. The court below further distinguished *Crook* as involving "a real 'confession' " (*id.* at 12A), but, as we have shown above, the distinction between inculpatory and facially exculpatory incriminating statements is one without a difference for purposes of Section 3501.

In *United States* v. *DiGilio*, 538 F. 2d 972, 985 (C.A. 3), the court ruled that the government had misused a grand jury subpoena to facilitate investigatory interrogation of the defendant outside the grand jury's presence, but that under Section 3501 it "lacked any supervisory authority to suppress" the defendant's statements unless they were given involuntarily. This case was sought to be distinguished by the court below on the sole ground (App. A, *infra*, p. 12A n. 12) that it "involved no question of whether defendants are treated differently by the Strike Force than the normal practice would require." [14] In our view the two courts' conflicting views regarding Section 3501's impact on supervisory powers cannot be explained on the basis of so irrelevant a factual difference between the cases.

[14] We find it hard to imagine how "normal practice" would not preclude the abuse of grand jury process found to have occurred in *DiGilio*.

3. Even had Congress not spoken on the evidentiary issues, grave questions would attend the court of appeals' exercise of its supervisory power in this case to immunize a defendant from liability for acts made criminal by statute. In *Lopez* v. *United States*, 373 U.S. 427, 440 (decided prior to enactment of both statutes discussed above), this Court observed that a court's supervisory power "to refuse to receive material evidence is a power that must be sparingly exercised." In that case—as in this one—there was "no manifestly improper conduct by federal officials," and the Court ruled that the exercise of its supervisory powers to suppress the defendant's testimony "would be wholly unwarranted." The Court continued (*ibid.*):

> The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a federal court.

See also *United States* v. *Grimes*, 438 F.2d 391, 395 (C.A. 6), certiorari denied, 402 U.S. 989; *United States* v. *Jones*, 433 F.2d 1176, 1181–1182 (C.A.D.C.),

certiorari denied, 402 U.S. 950; *United States* v. *Quarles,* 387 F.2d 551, 555–556 (C.A. 4), certiorari denied, 391 U.S. 922.

In the present case the court below acknowledged (App. A, *infra,* p. 4A) that the government's failure to warn respondent that she was a "putative defendant" did not violate her constitutional rights, and it did not consider whether any other of respondent's rights, statutory or court-announced, was violated. Rather, the court ruled that the simple lack of uniformity in prosecutorial practice created by the Strike Force attorney's failure to advise respondent of her status required the sanction of suppression and dismissal of the perjury count. In so ruling, the court has set a precedent of large dimensions and launched itself into the supervision of an area that has heretofore been left to self-regulation by the Executive Branch.

Nonuniformity in prosecutorial practice—provided it offends no statutory or constitutional proscription—has never, to our knowledge, been held a sufficient cause to terminate a criminal prosecution. The Executive Branch has broad discretion to carry out its constitutional mandate to "take Care that the Laws be faithfully executed" (United States Constitution, Art. II, Sec. 3). See *United States* v. *Nixon,* 418 U.S. 683, 693; *United States* v. *Cox,* 342 F. 2d 167, 171 (C.A. 5), certiorari denied *sub nom. Cox* v. *Hauberg,* 381 U.S. 935. This discretion embraces such vital matters as plea bargaining, sentencing recommendations, grants of testimonial immunity, and even the

selective enforcement of criminal laws, so long as the prosecutor's decisionmaking is not based upon impermissible standards "such as race, religion, or other arbitrary classification." *Oyler* v. *Boles,* 368 U.S. 448, 456; see also *Washington* v. *United States,* 401 F. 2d 915, 924–925 (C.A.D.C.). Put simply and in contrast to the court of appeals' view, uniformity in prosecutorial procedure is *not* generally "a fundamental of the administration of criminal justice" (App. B, *infra,* p. 22A), especially when its absence results in no prejudice to the rights of the defendant. See *Inmates of Attica Correctional Facility* v. *Rockefeller,* 477 F. 2d 375 (C.A. 2); *Newman* v. *United States,* 382 F. 2d 479, 480 (C.A.D.C.).

It makes no difference that the lack of uniformity here was caused by the Strike Force attorney's failure to follow a general policy already in existence.[15] The nonobservance of a discernible governmental standard that is intended to govern prosecutorial decisionmaking at any of the numerous stages of the criminal process where discretion must be exercised does not warrant dismissal of a prosecution if none of the defendant's rights has been violated. See *Sullivan* v. *United States,* 348 U.S. 170, 173–174; *United States* v. *Leonard,* 524 F. 2d 1076, 1088–1089 (C.A. 2); *United*

[15] Although each of the United States Attorneys in the Second Circuit appears to follow a practice of warning "putative defendants" of their status, and although in most cases most United States Attorneys apparently give such warnings, no governing Department of Justice policy exists and apparently the practice varies even within some United States Attorneys' offices.

States v. *Hutul,* 416 F. 2d 607, 626–627 (C.A. 7), certiorari denied, 396 U.S. 1012.[16]

There is no suggestion here that the prosecutor's decision not to warn respondent that she was a target of the grand jury investigation resulted from discriminatory or otherwise impermissible motives. There has been "no manifestly improper conduct by federal officials" (*Lopez* v. *United States, supra,* 373 U.S. at 440) in this case, and no right of respondent's has been abridged. Yet the court of appeals in effect has pardoned petitioner, acting out of an abstract interest in uniformity of prosecutorial performance and in plain disregard of this Court's twice-repeated caution (given in the context of entrapment cases but no less applicable here) that the federal judiciary does not sit to exercise "a 'chancellor's foot' veto over law enforcement practices of which it d[oes] not approve" (*Hampton* v. *United States,* 425 U.S. 484, 490 (plurality opinion), quoting from *United States* v. *Russell,* 411 U.S. 423, 435).

4. Even if the decision below does not conflict with the constitutional ruling in *United States* v. *Mandujano,* 425 U.S. 564, it nevertheless disregards

[16] The contrary result reached by the decisions below is not, however, without support. See *United States* v. *Caceres,* 545 F. 2d 1182 (C.A. 9); *United States* v. *Leahey,* 434 F. 2d 7 (C.A. 1); *United States* v. *Heffner,* 420 F. 2d 809 (C.A. 4); *United States* v. *Sourapas,* 515 F. 2d 295 (C.A. 9). The United States is now preparing a petition for a writ of certiorari to review the decision in *Caceres, supra.*

the principles underlying that decision." All eight Justices who voted in *Mandujano* agreed that, whatever warnings regarding the constitutional privilege against self-incrimination might be required to be given to "putative defendants" in general, the absence of warnings was immaterial in a perjury prosecution because "'[o]ur legal system provides methods for challenging the Government's right to ask questions—lying is not one of them'" (plurality opinion, *id.* at 577; concurring opinion of Mr. Justice Brennan, *id.* at 585; concurring opinion of Mr. Justice Stewart, *id.* at 609; quoting from *Bryson* v. *United States,* 396 U.S. 64, 72). In suppressing respondent's testimony, the court below has overridden the policies that sustained the prosecutions in cases such as *Bryson* and *Mandujano.* Cf. *Lego* v. *Twomey,* 404 U.S. 477, 488, n.16. Since the complete absence of "puta-

[17] Because this case involves a perjury prosecution, it is distinguishable from *United States* v. *Washington,* No. 74–1106, argued December 6, 1976, where the court of appeals affirmed suppression of the defendant's grand jury testimony in his prosecution for the substantive offense that was the subject of the grand jury investigation. Accordingly, even were this Court to reverse in *Washington,* that could not sustain the decision here.

This case also differs from *Washington* because here the court of appeals affirmed the dismissal of the indictment "to encourage uniformity of practice" (App. A, *infra,* p. 3A) and "for the limited purpose of preventing chaos in criminal law administration through the presence in the same district of a two-headed prosecution branch operating on conflicting procedures" (*id.* at 12A), whereas in *Washington* the court ruled that target warnings are constitutionally required by the Fifth Amendment self-incrimination clause.

tive defendant" warnings would not defeat a perjury prosecution even if it had violated the defendant's constitutional rights, a different result can hardly be justified simply because lack of the warnings in a particular case contrasts with the normal policy of the prosecutor's office.[18]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1977.

[18] We note also that even if the court of appeals' concern for the lack of uniformity in prosecutorial practice were well founded, the adoption of an exclusionary rule to suppress the testimony here and to compel future uniformity would nonetheless be unwarranted for the reasons stated in our brief in *Mandujano*, No. 74–754 (pp. 56–57). If the court wishes to announce rules to govern the conduct of prosecutors, it should do so prospectively and should look first to direct discipline of errant prosecutors for enforcement of such rules, rather than to the exclusion of relevant evidence and the dismissal of prosecutions.

APPENDIX A

United States Court of Appeals For the Second Circuit

No. 581—September Term, 1976

(Argued November 22, 1976. Decided December 30, 1976.)

Docket No. 75-1319

UNITED STATES OF AMERICA, APPELLANT
v.
ESTELLE JACOBS a/k/a "Mrs. Kramer,"
DEFENDANT-APPELLEE

Before: FEINBERG, GURFEIN AND VAN GRAAFEILAND, Circuit Judges

On remand from the Supreme Court, the Court of Appeals reexamined its previous opinion, reported at 531 F. 2d 87, in light of *United States* v. *Mandujano*, 96 S. Ct. 1768 (1976). The Court reaffirmed its holding that the grand jury testimony of defendant who had not been warned she was a "target" of the investigation should be suppressed and the perjury count upon which that testimony was based dismissed. The Court held that this decision was based solely upon its supervisory powers to insure the consistent administration of criminal justice within the Circuit and was limited to the particular circumstances in this action where the Strike Force attorney deviated from the practice of the United States Attorney in that District.

229-559—77——4

Edward R. Korman, Chief Assistant United States Attorney, Eastern District of New York (David G. Trager, United States Attorney for the Eastern District of New York, of counsel), *for Appellant U.S.A.*

Irving P. Seidman, New York, N.Y. (Rubin, Seidman & Dochter, New York, N.Y., of counsel), *for Defendant-Appellee.*

GURFEIN, *Circuit Judge:* This appeal is before us again on a remand, at the suggestion of the Solicitor General, "for further consideration in light of *United States* v. *Mandujano* [96 S. Ct. 1768 (1976)]." 45 U.S.L.W. 3327–28.[1] This affords us an opportunity to explicate our previous opinion, *United States* v. *Jacobs,* 531 F. 2d 87.[2] In that opinion we affirmed the dismissal of a perjury count against defendant Jacobs, the necessary predicate of which was her testimony before the grand jury, which we held had been properly suppressed in the circumstances.

When we filed our decision, the Supreme Court had not yet reversed the Fifth Circuit in *Mandujano,* 496 F. 2d 1050 (5th Cir. 1974), the authority relied upon by the District Court in our case. But the Supreme Court had already granted certiorari.

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[1] Mr. Justice Stewart and Mr. Justice Marshall each wrote dissenting opinions. Mr. Justice Stewart also concurred in Mr. Justice Marshall's opinion as did Mr. Justice Brennan. Mr. Justice Stevens concurred in the decision to remand for clarification of one point.

[2] Because we were exercising supervisory power, contrary to our usual practice, the opinion was circulated before filing to all active and senior judges of the circuit. Four active judges, in addition to the panel, indicated agreement in written memorandum. One active judge was away and did not respond. Only one active judge would have voted to reverse. No senior judge suggested reversal. Two senior judges wrote memoranda, one indicating agreement, and the other concurring in the result. We did not mention this originally because we deemed it an internal matter.

Although perhaps it could have been made clearer in our previous opinion, the justices who dissented on the remand were correct in surmising that we intended to make explicit in our opinion that we were familiar with the Fifth Circuit opinion in *Mandujano,* and that we were unwilling to acquiesce in it on constitutional grounds. We did not purport to establish a continuing requirement, but to impose a one-time sanction to encourage uniformity of practice (whatever the practice might be) between the Strike Force and the United States Attorney in the *same* district. We refused to affirm the District Court on the basis of the *constitutional doctrine* of *Mandujano* which it had accepted as correct. In that sense we may be said to have anticipated the decision of the Supreme Court, now called to our attention on remand.

In this circuit the thrust of the case law, from a constitutional point of view, has been more akin to the Supreme Court's subsequent decision in *Mandujano* than to the decision of the Fifth Circuit. *E.g., United States* v. *Del Toro,* 513 F. 2d 656, 664 (2d Cir.), *cert. denied,* 423 U.S. 826 (1975). In *Jacobs,* we noted, however, that in *Del Toro* and in a series of similar cases, the defendant had, in practice, always been warned that he was a target of the investigation.[3] That this has been the uniform practice of prosecutors in our

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[3] *See, e.g., United States* v. *Bonacorsa,* 528 F. 2d 1218, 1223 (2d Cir. 1976) (appeal from E.D.N.Y.); *United States* v. *Del Toro,* 513 F. 2d 656, 660 (2d Cir. 1975); *United States* v. *Corallo,* 413 F. 2d 1306, 1328, 1329, n.6 (2d Cir.), *cert. denied,* 396 U.S. 958 (1969); *United States* v. *Capaldo,* 402 F. 2d 821 (2d Cir. 1968); *United States* v. *Irwin,* 354 F. 2d 192, 199 (1965) *cert. denied,* 383 U.S. 967 (1966); *United States* v. *Winter,* 348 F. 2d 204, 205–06 (2d Cir.), *cert. denied,* 382 U.S. 955 (1965). *Cf. United States* v. *Scully,* 225 F. 2d 113, 116 (2d Cir.), *cert denied,* 350 U.S. 897 (1953).

circuit, for much longer than twenty years, was perceptively observed by Judge Medina in *United States* v. *Scully*, 225 F. 2d 113, 116 (2d Cir. 1955). Since the Strike Force prosecutor failed to give such warning, we were unable on this appeal to distinguish the Fifth Circuit opinion in *Mandujano*, as we were able to do in *United States* v. *Bonacorsa*, 528 F. 2d 1218, 1223 (2d Cir. 1976), a decision in which two members of the *Jacobs* panel, Judges Feinberg and Van Graafeiland concurred.

While we did not think the warning to be necessary on *Miranda* grounds, we also did not believe that because an omission by a prosecutor is within constitutional limits, he *must* necessarily omit that which he is constitutionally permitted to omit. What the Constitution does not require it does not necessarily forbid.

Surprised, as we were, to find that what we had thought to be a common practice of prosecutors in the circuit for more than twenty years was not followed, we canvassed each of the United States Attorneys in the circuit for their practice in this regard. We were informed that every United States Attorney, in practice, warns the potential defendant that he is a target of the investigation. The appeal before us involved a prosecution by the Strike Force in the Eastern District of New York as authorized by 28 U.S.C. § 515.

The Strike Force, consisting of special attorneys appointed by the Attorney General, operates theoretically under the supervision of the United States Attorney. 28 U.S.C. § 543.[4] *See In re Subpoena of*

[4] Section 543 applies to "special attorneys" appointed to appear before the grand jury, § 515(a); Assistant United States Attorneys are appointed under § 542.

Persico, 522 F. 2d 41, 56 (2d Cir. 1975). (For instance, in this appeal the Strike Force filed papers under the name of the United States Attorney for the Eastern District of New York.) The Attorney General has promulgated guidelines "governing interrelationships between Strike Forces and United States Attorneys' Offices."[5] The Guidelines provide that "[w]hen a specific investigation has progressed to the point where there is to be a presentation for an indictment, the Chief of the Strike Force shall then for this purpose operate under the direction of the United States Attorney who shall oversee the judicial phase of the development of the case."

Though we did not think it necessary to spell it out in our earlier opinion, we think that this prescribed direction by the United States Attorney applies to this case. As we noted, "[operation] under the direction of the United States Attorney * * * should have been assumed by the Strike Force." 531 F. 2d at 90, n.6.

We did not specifically refer to the analogy of an agency being required to adhere to its own regulations, *Service* v. *Dulles*, 354 U.S. 363, 732 (1957), because we recognized that the Attorney General in his prosecutorial function may be, strictly speaking, less restricted than the Secretary of State. However, the analogy is persuasive when the Attorney General actually promulgates Guidelines for supervision by the United States Attorney in specific circumstances, *see United States* v. *Leahey, supra; United States* v. *Heffner*, 420 F. 2d 809 (4th Cir. 1969) (*non-constitutional*

[5] Office of the Attorney General, Order No. 431–70, Establishing Guidelines Governing Interrelationships Between Strike Forces and United States Attorneys' Offices, reprinted in *In re Subpoena of Persico*, 522 F. 2d 41, 68 (2d Cir. 1975) (appendix) (hereinafter "Guidelines").

ground), and inconsistent treatment results therefrom.

We exercised supervisory power in the limited area of the relationship between the Strike Force attorney and the United States Attorney under a fair inference from the Guidelines, though not as a generally applicable exclusionary rule. Although we have confirmed the right of Strike Force attorneys to appear before the grand jury, *see Persico, supra,* we are not committed by statute to allowing them to come into the circuit and to evade the rules and supervision of the United States Attorneys. We think it our duty to avoid uneven justice in the circuit, resulting from mere negligence or inattention to established practice and guidelines. There is, of course, nothing to prevent the Department of Justice from formulating a national policy to *prohibit* all prosecutors from following the ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function (Approved Draft 1971) Section 3.6(d) which provides:

> If the prosecutor believes that a witness is a potential defendant he should not seek to compel his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advice concerning his rights.

It is an important function of the administration of criminal justice to let our citizens know that equal justice is available to all, as the Chief Justice has so eloquently said on more than one occasion. Having determined that the policy of the various prosecutors should be uniform—constitutional limitations quite aside—we were confronted with the proper remedy to apply. Normally, any appellate court finds itself in a veritable dilemma when its choice is between vindicating a rule by sanction and allowing a possibly guilty

person to escape. In this case, fortunately, we faced no such dilemma. For the appellant remains indicted for the substantive crime, and, if certiorari had not been applied for, would already have been tried by a jury. *See United States* v. *Mandujano, supra,* 96 S. Ct. at 1773 n.2, where the prosecutor obtained a conviction on the substantive count before the Supreme Court heard the appeal on the perjury count.

We abhor perjury, but the limited question is whether, in these particular circumstances, the prosecution was entitled to the luxury of a perjury count, which in this case was essentially a strategic ploy which would make conviction of the substantive count easier if the counts were to be joined in a single trial.[*] In this case, the Government claims to have a recorded transcript which purportedly establishes guilt on the substantive count. To quote Judge Stevens (now Mr. Justice Stevens) in a similar connection:

> Accepting the prosecutors' evidence as true, defendant's participation in the crime had already been established and, therefore, no further investigation was necessary. * * * If the evidence of guilt is as strong as the prosecutor contends, such direct communication [with the defendant in the absence of counsel] is all the more offensive because it was unnecessary. If there is doubt about defendant's guilt, it should not be overcome by a procedure such as this. *United States* v. *Springer,* 460 F. 2d 1344, 1354 (7th Cir. 1972) (dissenting opinion).

Finally, we should state in response to the request for clarification in Mr. Justice Stevens' concurring

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[*] The maximum penalty for violation of 18 U.S.C. § 1623 is imprisonment for five years and a $10,000 fine. It is hardly likely that upon conviction of a first offender, this maximum would be inadequate.

opinion that we did not assume that an error of the prosecutor in failing to give warning in the grand jury would lead inexorably to the conclusion that the witness cannot be prosecuted for perjury. On the contrary, we had assumed the opposite,—that she could be so prosecuted [1] as the Supreme Court later held in *Mandujano*.

For the reasons previously stated, our opinion was based only on our supervisory power, exercised in a circumscribed manner involving the Strike Force, and in circumstances where under the sanction imposed, a guilty person, in any event, would not be likely to escape conviction because of our ruling.

We intended our opinion to have no prospective application as precedent for the District Courts on the constitutional issue. Our only purpose was to make the practice of the Task Force conform to that of the United States Attorney in the *same* district, and we think that the sanction of suppression is salutary in the circumstances.

II

After the remand we ordered a second oral argument. The Government presses two points: (1) that we do not have power to suppress the testimony, and (2) that *Mandujano* compels reversal of Judge Neaher's order suppressing the testimony and dismissing Count Two.

At oral argument, the Government conceded, perhaps reluctantly, that the Courts of Appeals do have supervisory power. Mr. Justice Rehnquist stated the

[1] *Cf. United States* v. *Winter*, *supra*, 348 F. 2d at 208.

general rule, in *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973):

> Within such a unitary jurisdictional framework the appellate court will, of course, require the trial court to conform to constitutional mandate, but it may likewise require it to follow procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or the Constitution.[8]

The supervisory power in criminal cases was stated to exist in the oft-cited case of *McNabb* v. *United States*, 318 U.S. 332, 340 (1943), with respect to the Supreme Court. The Courts of Appeals have repeatedly exercised this power in criminal actions. In *Burton* v. *United States*, 483 F. 2d 1182 (9th Cir. 1973), the court quoted the Supreme Court's statement in *LaBuy*, *supra*, that "supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system", 352 U.S. at 259–60, and noted that "this pronouncement has been reaffirmed by every Court of Appeals". 483 F. 2d at 1187.[9] And in this Circuit the power has been clearly recognized. *See United States* v. *Toscanino*, 500 F. 2d 267, 276 (2d Cir. 1974); *United States* v. *Estepa*, 471 F. 2d 1132, 1136 (2d Cir. 1972); *United States* v. *D'Angiolillo*,

[8] While *Cupp* involved a state court appeal, the quoted discussion concerned the federal Courts of Appeals. In any case, it is clear that there is federal supervisory power of the Court of Appeals over the District Courts. *See La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259–60 (1957).

[9] Of the 30 cases cited in *Burton* for this proposition, 25 involved criminal actions or grand jury proceedings.

340 F. 2d 453, 456 (2d Cir.), *cert. denied,* 380 U.S. 955 (1965); *United States* v. *Dooling,* 406 F. 2d 192, 198 (2d Cir. 1969)."

A specific example that comes to mind relates to the *Allen* charge. In *Allen v. United States,* 164 U.S. 492, 501-02 (1896), the Supreme Court approved a lower court charge which still bears the name of that case. Despite this *imprimatur,* some federal courts of appeals, in avowed exercise of their supervisory power, have directed trial judges not to use it. *United States* v. *Thomas,* 449 F. 2d 1177, 1186 (D.C. Cir. 1971); *United States* v. *Fioravanti,* 412 F. 2d 407, 420 (3d Cir.), *cert. denied,* 396 U.S. 837 (1969); *United States* v. *Brown,* 411 F. 2d 930, 933 (7th Cir. 1969), *cert. denied,* 396 U.S. 1017 (1970). These cases surely do not demonstrate a disrespect for the Supreme Court. They perhaps, in part, represent a recognition of the undesirability of unequal treatment, as evidenced by many appeals, when some judges use the *Allen* charge and others do not.

Despite this cogent history of the supervisory powers of the federal courts of appeals, the Government contends that two Acts of Congress stand in the way of the exercise of such supervisory power. First, it points to 18 U.S.C. § 3501(a) which provides that a confession, which includes "any self-incriminating statement" 3501(e), "shall be admissible in evidence if it is voluntarily given," and draws the conclusion

[10] In *United States* v. *Freeman,* 357 F. 2d 606, 614 (2d Cir. 1966), Judge Kaufman (now Chief Judge) noted that "our duty to supervise the administration of criminal justice in the courts of this Circuit can hardly be subject to the same restrictions as our power to impose constitutional requirements upon unwilling state tribunals".

that the Court of Appeals therefore had no power to suppress it. On its face, Section 3501 deals with the admissibility of confessions at *trial.* At such trial, the trial judge is not compelled to admit the "confession" unless he finds it voluntary, but "in determining the issue of voluntariness he shall take into consideration all the circumstances surrounding the giving of the confession." § 3501(b). Among the enumerated factors to be considered is "whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession." There is no evidence that Mrs. Jacobs had such knowledge. Nor do we see by what semantic process a denial of guilt can be called a confession. A denial is not an admission, and by the same token, it is not a "confession" or "self-incriminating statement."

Second, the Government takes the extreme position that by Rule 402 of the Federal Rules of Evidence (a Congressional enactment) relevant evidence is to be excluded solely in those cases where exclusion is required "by the Constitution of the United States by Act of Congress, by those rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." It offers no history to support the view that Congress was concerning itself with the supervisory powers of the federal courts. The obvious purpose of the catchall clause was to bar common law rules of evidence or state rules of evidence, if inconsistent.

In deciding the issue we need not agree or disagree with the dictum concerning § 3501(a) in *United States* v. *Crook,* 502 F. 2d 1378 (3d Cir. 1974), *cert. denied,* 419 U.S. 1123 (1975). In that case there was a claim

of violation of *Massiah* rights [11] by the FBI in questioning Crook. The Court of Appeals held that appellant had knowingly waived his right to consult counsel and that "there was full compliance with *Miranda*." Therefore, the reference to Section 3501(a) was unnecessary to the decision. In *Crook* failure to give notice *precluded* a knowing waiver. Finally, in *Crook*, there was a real "confession" not a denial of guilt." [12]

It requires a good deal of stretching to say that these general statutes, in any event, were preclusive of supervisory power which is exercised, not in derogation of a procedural rule or statute, but for the limited purpose of preventing chaos in criminal law administration through the presence in the same district of a two-headed prosecution branch operating on conflicting procedures. We assert no roving commission to right the wrongs of criminal defendants.

It is in the exercise of that extremely restricted assertion of supervisory power that we approach our duty under *Mandujano*. We have recognized that a constitutional claim may not be asserted as a defense to a perjury charge. *United States* v. *Winter, supra,* note 7. And implicit in our previous opinion was the recognition of *United States* v. *Knox*, 396 U.S. 77 (1969), and related cases. We also clearly noted that a potential defendant had no constitutional right not to be called before the grand jury, citing *Winter, supra,*

[11] *See Massiah* v. *United States*, 377 U.S. 201 (1964).

[12] "Crook is before the District Court on an indictment charging robbery of a Wyncote, Pennsylvania bank, and the challenged statement *admitted* that he did so." 502 F. 2d at 1379 (emphasis added). *See also United States* v. *DiGilio*, 538 F. 2d 972 (3d Cir. 1976). This case relied upon *Crook* and involved no question of whether defendants are treated differently by the Strike Force than the normal practice would require.

and *United States* v. *Dionisio*, 410 U.S. 1, 10, n. 8 (1973). We did not think it useful to explore the constitutional situation in detail, for we relied on no constitutional doctrine in imposing the sanction.

III

What we must now reconsider is whether the sanction we imposed was too harsh for the didactic purpose intended in light of *Mandujano*. Here we find some difficulty in assessing the meaning of the remand.

We do not know whether the Supreme Court meant that we should, under no circumstances, use our supervisory power because this is a perjury case, or whether we should reconsider the sanction of suppression in the light of the constitutional holding of *Mandujano*. We are inclined to believe it is the latter, for the Supreme Court had no occasion in *Mandujano* to consider the effect of a generation of uniform practice by the United States Attorneys in the Second Circuit, now broken apparently by a lack of liaison in the prosecuting function of Government. Moreover, the Fifth Circuit in *Mandujano* had relied on an extension of *Miranda* warnings to grand jury witnesses, which was not our point at all.

We placed no emphasis on the circumstance that this testimony involved a perjury count as well as a count for an alleged violation of 18 U.S.C. § 875(c). We simply affirmed the suppression of appellant's testimony which could presumably be used in the prosecution of the substantive count as well. In sum, we did not agree to the District Court's suppression *because* it was allegedly perjured testimony, nor did we strike the perjury indictment as such.

In imposing the sanction of suppression, and, in these special circumstances, the concomitant dismissal of the perjury count for lack of a predicate, we did not go as far as we did in *United States* v. *Estepa, supra.* There we reversed a narcotics conviction and dismissed the indictment after a trial establishing guilt, not because of any constitutional mandate, *see United States* v. *Costello,* 350 U.S. 359 (1956), but in the exercise of our supervisory power. There Judge Friendly (then Chief Judge) said "* * * a reversal with instructions to dismiss the indictment may help to translate the assurance of the United States Attorneys into *consistent* performance by their assistants." 471 F. 2d at 1137 (emphasis added). We have commented *in camera* from time to time on the failure of certain special attorneys to avail themselves of the central repository of legal knowledge and judgment that exists in the regular United States Attorneys' offices.

Since we did not anticipate an affirmance of the Fifth Circuit in *Mandujano* and did not rely on the decision of that Court which was subsequently reversed, we respectfully adhere to our previous decision. We note that it is not intended to mandate any specific procedure, but to serve as an *ad hoc* sanction, as in *Estepa,* to enforce "consistent performance" one way or the other. Appellant [sic] will, in any event, be tried on a serious substantive count. But the effect of the sanction may be to bring the Strike Force and the United States Attorney to closer harmony, a boon for even-handed law enforcement which often will redound to the benefit of the prosecution rather than of the defense.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 443—September Term, 1975

(Argued November 13, 1975, Decided February 24, 1976) Docket No. 75-1319

UNITED STATES OF AMERICA, APPELLANT

against

ESTELLE JACOBS, A/K/A "MRS. KRAMER," DEFENDANT-APPELLEE

Before: FEINBERG, GURFEIN AND VAN GRAAFEILAND, Circuit Judges

Appeal from an order of the United States District Court for the Eastern District of New York, Edward R. Neaher, *Judge,* which granted defendant-appellee's motion to suppress her Grand Jury testimony and to dismiss Count Two of the indictment against her.

Affirmed.

Edward C. Weiner, Special Attorney, United States Department of Justice (David G. Trager, United States Attorney, Eastern District of New York), for *Appellant.*

Irving P. Seidman, New York, N.Y. (Rubin, Seidman & Dochter, New York, N.Y., of counsel), *for Defendant-Appellee.*

GURFEIN, *Circuit Judge:* The United States appeals from an order of the United States District

Court for the Eastern District of New York (Hon. Edward R. Neaher, *Judge*), granting a motion to suppress the Grand Jury testimony of defendant-appellee Estelle Jacobs and dismissing Count Two of the indictment against her.[1] The defendant had moved for an evidentiary hearing and an order to dismiss the indictment on the ground, *inter alia*, that she was a subject of the investigation but had not been informed that she was a subject when she was subpoenaed to testify before the Grand Jury. Judge Neaher granted the motion to dismiss Count Two of the indictment which charged the making of false statements before the Grand Jury in violation of 18 U.S.C. § 1623, but denied the motion to dismiss Count One. The government appeals the dismissal of Count Two pursuant to 18 U.S.C. § 3731.

The facts are not in dispute with regard to the procedure followed. The defendant is a housewife who was employed at various times in a collection agency. During March 1973 Harry W. Stonesifer, Jr. ("Harry"), using the name of his brother, William D. Stonesifer ("William"), incurred a gambling debt of $5,060 on a junket to Puerto Rico. During May 1973 defendant serviced this collection account for her employer. She made several telephone calls in that connection, and on May 22, 1973 she allegedly made a telephone call to William, recorded on tape by him, which contained a threat to injure the person of Harry. William notified the Federal Bureau of Investigation ("FBI"). On September 13, 1973

[1] The indictment, filed on November 11, 1974, contains two counts: Count One charged a violation of 18 U.S.C. § 875(e)—transmitting in interstate commerce a threat to kidnap or injure another. Count Two was the perjury count which was dismissed and which is the subject of this appeal.

the defendant was interviewed by the FBI who advised her of her *Miranda* rights including the right to remain silent and the right to appointed counsel. She signed an "Advice of Rights" form. The agents questioned her about the Stonesifer account and the fact that she had used the name "Mrs. Kramer" in making telephone calls on the Stonesifer account. She denied that she had harassed William on the telephone. She was not told that her conversation had been recorded.

On June 10, 1974, about nine months later, she was called before the Grand Jury by a subpoena issued by the Organized Crime Strike Force.[2] She appeared without counsel at that first session; she was warned by the Strike Force Attorney that under the Fifth Amendment she could "refuse to answer any question that you feel might tend to incriminate you." She was also told that under the Sixth Amendment she had a right to counsel of her choice who could be outside the Grand Jury room to assist her "about the procedures on any specific questions." Asked whether she felt the need of an attorney, she responded, "I do not." She was also informed that perjury is a "very serious offense." Appellee was asked to affirm or deny her conversations with William which had been recorded, though the fact of recording was not disclosed to her. Her denials were the basis for Count Two of the indictment.

[2] The Strike Force attorneys operate under a commission from the Attorney General pursuant to 28 U.S.C. § 515(a) and under guidelines promulgated by the Attorney General. See Office of the Attorney General, Order No. 431-70, Establishing Guidelines Governing Interrelationships Between Strike Forces and United States Attorneys' Offices, reprinted in *In re Persico*, 522 F. 2d 41, 68 (2 Cir. 1975) (appendix).

The Strike Force attorney at her first appearance before the Grand Jury had in his possession the recording of her conversation with William, and, as Judge Neaher found, "[t]he government admits that when she was called to testify before the grand jury the defendant was not just another witness, but was in fact a 'putative defendant,' in that the government had incriminating evidence against her." Nevertheless, she was not warned at the time of her first appearance that she was a subject of the investigation or that she had an absolute right to remain silent.

The District Court concluded that, under the circumstances, the defendant was entitled to "full" *Miranda* warnings including the advice that she had an absolute right to remain silent. It noted that "simply with the possession of the wiretap tape, the government undoubtedly felt it had all but the identity evidence for probable cause to be found by the grand jury that Jacobs violated 18 U.S.C. § 875(c)." He also noted that the Grand Jury had been presented with "sufficient independent identity evidence." The court ruled, accordingly, that "[u]nder the circumstances, asking her if she made the statements the government already had recorded, without fair warning of the trap she was being led into is not permissible prosecutorial conduct," since "the questions which led to the alleged perjurious responses served *no other function* than to give the government an additional prop on which to base its case against defendant" (emphasis in original).

Judge Neaher relied on *United States* v. *Mandujano*, 496 F. 2d 1050 (5 Cir. 1974), *cert. granted*, 420 U.S. 989 (1975). He concluded, as had the Fifth

Circuit, that the prosecutorial conduct involved was "so 'offensive to the common and fundamental ideas of fairness' as to amount to a denial of due process." 496 F. 2d at 1059.[3] His decision to dismiss the false statement count was predicated on the "due process" clause of the Fifth Amendment rather than on its "self-incrimination" provision.

We do not reach either the claimed "self-incrimination" violation or the claimed "due process" violation under the Fifth Amendment. We have held that a prospective defendant may be questioned before a Grand Jury about statements he made in a recording in the possession of the government, without being told of the existence of the recording. *United States* v. *Del Toro*, 513 F. 2d 656, 664 (2 Cir. 1975), *cert. denied*, 44 U.S.L.W. 3201 (U.S. Oct. 6, 1975). But we noted that the defendants had been advised not only of their constitutional rights but also that each "was a target of the investigation." 513 F. 2d at 660.[4] That was not done here.

It appeared to us that prosecutors in this circuit generally had been following Section 3.6(d) of the ABA Project on Standards for Criminal Justice,

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[3] In *Mandujano*, as here, a Special Attorney was involved. As the court noted, "[s]omewhere within this chain of command and information" between him and the United States Attorney a decision was made to subpoena Mandujano as a witness. 496 F. 2d at 1058 n.8.

[4] So, too, in *United States* v. *Winter*, 348 F. 2d 204, 205 (2 Cir.), *cert. denied*, 382 U.S. 955 (1965), also a perjury prosecution, the defendant was advised that he was "a prospective defendant," and we left aside the question whether a potential defendant must be advised of his status since that question was not presented on the facts of the case. 348 F. 2d at 208.

Standards Relating to the Prosecution Function (Approved Draft 1971).[5] Section 3.6(d) provides:

> If the prosecutor believes that a witness is a potential defendant he should not seek to compel his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advice concerning his rights.

See *United States* v. *Washington*, 328 A. 2d 98, 100 (D.C. App. 1974).

We did not wish simply to assume, however, that all prosecutors in the circuit now adhere to this standard. We accordingly directed the clerk of our court to make written inquiry of the United States Attorneys for each district in the circuit concerning their practice in this regard.

The United States Attorneys have replied with unanimity that where a person called before the Grand Jury is known to be a potential defendant he is warned that he is a "target of the investigation" or a "subject of the investigation." More particularly, the United States Attorney for the Eastern District of New York, where the Grand Jury which heard this defendant sat, replied that "our practice is to advise the potential defendant * * * that he is a target of the investigation."

We thus have a situation in the Eastern District where if Estelle Jacobs had appeared before the Grand Jury on a subpoena issued by the United

[5] See, *e.g.*, *United States* v. *Bonacorsa*, slip op. 1451, 1460 (2 Cir. Jan. 9, 1976); *United States* v. *Del Toro*, *supra*, 513 F. 2d at 660; *United States* v. *Corallo*, 413 F. 2d 1306, 1328, 1329 n.6 (2 Cir.), *cert. denied*, 396 U.S. 958 (1969); *United States* v. *Irwin*, 354 F. 2d 192, 199 (2 Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); *United States* v. *Winter*, *supra*, 348 F. 2d at 205; cf. *United States* v. *Scully*, 225 F. 2d 113, 116 (2 Cir.), *cert. denied*, 350 U.S. 897 (1955).

States Attorney she would have been warned that she was a target, while the Strike Force operating in the same district failed to give her such warning.

In this posture of conflicting conceptions of prosecutorial fairness in the same district, we need not consider whether there is a constitutional due process claim as the court below held. Uniform justice is not achieved in the face of such disparity which, if not in actual violation of the Constitution, is, at least, outside the penumbra of fair play. In *In re Persico*, 522 F. 2d 41 (2 Cir. 1975), we upheld the right of Strike Force attorneys to appear before the Grand Jury partly because they were under the supervision of the United States Attorneys. We are sorry to learn that this may not always be the fact. We suggest that Strike Force attorneys should be instructed on and should adhere to the practices of the United States Attorney.[6]

[6] Reviewing the guidelines set out in Appendix A to the *Persico* opinion, *supra*, we note that there appears to be an omission with regard to the matter here at issue. It is provided, *inter alia*, that "[t]he Chief of the Strike Force and the United States Attorney * * * shall have the responsibility of keeping each other fully advised of all organized criminal matters in progress." 522 F. 2d at 68. "Fully" is perhaps too ambiguous and requires clarification. It is also provided: "When a specific investigation has progressed to the point where there is to be a presentation for an indictment, the Chief of the Strike Force shall then for this purpose operate under the direction of the United States Attorney who shall oversee the judicial phase of the development of the case."

Id. at 69. What is lacking is a statement that when the investigation has progressed to the point where witnesses are called to testify before the Grand Jury, the Strike Force shall operate under the direction of the United States Attorney. We think this should have been assumed by the Strike Force since, under the guidelines, even preliminaries, such as arrest warrants and search warrants are, where practicable, to be sought with the concurrence of the United States Attorney. *Id.*

In the interest of uniformity in criminal procedure within the circuit, which is a fundamental of the administration of criminal justice, we affirm the dismissal of Count Two pursuant to our supervisory function.

We do not mean to imply that a potential defendant has a constitutional right not to be called before the Grand Jury at all. See *United States* v. *Dionisio*, 410 U.S. 1, 10 n.8 (1973); *United States* v. *Doe*, 457 F. 2d 895, 898 (2 Cir. 1972), *cert. denied*, 410 U.S. 941 (1973); *United States* v. *Winter*, 348 F. 2d 204, 207–08 (2 Cir.), *cert. denied*, 382 U.S. 955 (1965). Nor do we deal with perjury committed by a prospective defendant after adequate warning of his status. We are satisfied that we should affirm in this case solely under our supervisory power.[1]

[1] Since the suppression of the Grand Jury testimony wipes out the entire predicate for the perjury count in this case, Judge Neaher also properly dismissed Count Two of the indictment before trial.

APPENDIX C

United States Court of Appeals for the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of February one thousand nine hundred and seventy-six.

Present: Hon. Wilfred Feinberg, Hon. Murray I. Gurfein, Hon. Ellsworth Van Graafeiland, *Circuit Judges.*

[Filed Feb. 24, 1976, A. Daniel Fusaro, Clerk]

75–1319

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ESTELLE JACOBS, a/k/a "MRS. KRAMER",
DEFENDANT-APPELLEE

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

By /s/ Vincent A. Carlin,
VINCENT A. CARLIN,
Chief Deputy Clerk.

APPENDIX D

United States Court of Appeals, Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of April, one thousand nine hundred and seventy-six.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ESTELLE JACOBS, A/K/A "MRS. KRAMER",
DEFENDANT-APPELLEE

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, United States of America, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ Irving R. Kaufman,
IRVING R. KAUFMAN,
Chief Judge.

United States Court of Appeals, Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the

United States Court House, in the City of New York, on the twenty-ninth day of April, one thousand nine hundred and seventy-six.

Present: Hon. Wilfred Feinberg, Hon. Murray I. Gurfein, Hon. Ellsworth Van Graafeiland, *Circuit Judges.*

75-1319

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ESTELLE JACOBS, A/K/A "MRS. KRAMER",
DEFENDANT-APPELLEE

A petition for a rehearing having been filed herein by counsel for the appellant, United States of America

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

APPENDIX E

United States District Court, Eastern District of New York

74 CR 703

UNITED STATES OF AMERICA

against

ESTELLE JACOBS, A/K/A "MRS. KRAMER", DEFENDANT

Appearances: David G. Trager, Esq., United States Attorney, Eastern District of New York, by Edward C. Weiner, Esq., Special Attorney, United States Department of Justice. Rubin, Seidman & Dochter, Esqs., Attorneys for Defendant, by Irving P. Seidman, Esq.

MEMORANDUM AND ORDER

NEAHER, *District Judge:* The defendant moves to dismiss the indictment on the ground, *inter alia,* that when called before the grand jury to testify, she was not warned that she was a subject of the investigation.

The facts are not in dispute. The defendant is a housewife who was employed at various times in a credit collection agency. She appeared when summoned, without counsel, before a federal grand jury on June 10, 1974 and on November 4, 1974. The government admits that when she was called to testify before the grand jury the defendant was not just another witness, but was in fact a "putative

defendant," in that the government had incriminating evidence against her.[1]

The warnings given her on each occasion are set forth in the margin.[2] She was not warned at the time of her first appearance that she was the subject of the investigation. Shortly after her second appearance she was indicted for communicating a threat over the telephone, 18 U.S.C. § 875(c), and for perjury before the grand jury, 18 U.S.C. § 1623, when she denied the alleged threatening statements.

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[1] The grand jury transcript of November 4, 1974 (at p. 4) makes it clear that the defendant was a "subject" of the grand jury investigation, and government counsel who conducted the grand jury investigation, Edward C. Weiner, Esq., admitted this in open court and in his brief (at p. 15). Moreover, an internal Department of Justice memorandum, February 15, 1974, disclosed to the court in connection with defendant's argument that Mr. Weiner lacked proper authorization to appear before the grand jury, reveals that the defendant was indeed a target of the grand jury investigation.

[2] June 10, 1974:

"Q. Mrs. Kramer, I want to explain to you your various Constitutional rights that you have as a witness who appears before a Federal Grand Jury. I want to tell you that this is a Federal Grand Jury inquiring into the possibility of a violation of the Federal Criminal Law, and the first right you have is the right under the Fifth Amendment to refuse to answer any question that you feel might tend to incriminate you; do you understand what your rights are under the Fifth Amendment?

"A. Yes.

"Q. At any time you feel the questions I am asking may tend to incriminate you, you will not be obliged to answer those questions; do you understand that?

"A. Yes, I do.

* * * * *

"Q. Now, the next right you have under the Sixth Amendment, is the right to counsel; you can have a lawyer of your choice outside of the Grand Jury room to assist you with any questions that

Jacobs was therefore in much the same situation as the "putative defendants" in *United States* v. *Mandujano*, 496 F. 2d 1050 (5 Cir. 1974), *cert. granted*, 95 S. Ct. 1422 (1975), and in *United States* v. *Rangel*, 496 F. 2d 1059 (5 Cir. 1974). In those cases, the court,

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you may have a question with * * * you may have an opportunity to leave the Grand Jury room and consult with your attorney, do you understand that right?

"A. Yes, I do.

"Q. Do you have an attorney with you today?

"A. No, I do not.

"Q. Now, do you feel the need of one?

"A. I do not."

Transcript at 2–3.

November 4, 1974:

"Q. I believe you appeared before this Grand Jury on June 10, 1974, is that correct?

"A. That's correct.

"Q. At that time, Mrs. Jacobs, I explained to you your various Constitutional rights.

Do you have any questions now about those rights?

"A. No.

[Government counsel then repeated substantially the Fifth Amendment privilege and right to counsel warnings as above set forth.]

"Q. If at any time you would like to interrupt the proceedings and call an attorney, let me know and you will be given the opportunity.

"A. There is one question as to Mr. Weiner—

"Q. Yes.

"A. I'm here and you are asking me if I feel—I don't know why I'm here, Mr. Weiner, to be very honest with you. You are implying do I feel, do I need an attorney. I have asked you repeatedly why am I here.

"Q. You are a subject of this investigation, Mrs. Jacobs.

"A. I told you everything I know, Mr. Weiner.

"Q. I have some additional questions and that's why you're here today."

Transcript at 2–4.

underscoring that the questioning proceeded without full *Miranda* warnings regarding the defendants' rights to remain silent and to appointed counsel, found the questioning concerning criminal activity under the circumstances to be "beyond the *pale of permissible prosecutorial conduct*," *United States* v. *Mandujano*, *supra*, 495 F. 2d at 1058 (emphasis in original), and a violation of Fifth Amendment Due Process. *Id.* The court reasoned that grand jury questioning by the prosecutor in such circumstances smacks of entrapment and the baiting of the defendant to commit perjury. Since the defendant in each case was not likely to confess to a crime before the grand jury, "[h]is only 'safe harbor' was to remain silent—a right of which the government failed to inform him." *Id.* at 1055. While a defendant could have asserted his Fifth Amendment privilege against self-incrimination in such circumstances, the court found the warnings advising of such a right to be minimally adequate at best in a situation where questions were asked calculated to elicit answers that were either incriminatory or perjurious. Under such circumstances, the court held that a full Fifth Amendment warning which includes the right to remain silent must be given. *Id.* at 1056–57.

In this case Jacobs, brought before the grand jury the first time without being told she was a subject of the investigation[3] or that she had the absolute right to remain silent, was asked specific questions concerning the making of allegedly threatening statements. In framing the questions which are alleged to have resulted in perjury, the prosecutor appar-

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[3] She was only told this at her second appearance, see n.2, *supra*, while the basis of the perjury count was her testimony at her first appearance.

ently read from a transcript of the telephone conversation during which the threats were allegedly made. It is now clear that this was possible only because the government had beforehand a tape recording of the conversation allegedly involving the defendant, derived from a phone wiretap. In short, before the defendant made her first appearance before the grand jury, the government prosecutor had undoubtedly made his own factual determination, to his satisfaction, that Jacobs was guilty of the crime about which she was questioned and later indicted. And, simply with the possession of the wiretap tape, the government undoubtedly felt it had all but the identity evidence for probable cause to be found by the grand jury that Jacobs violated 18 U.S.C. § 875(c).[4]

Under the circumstances, asking her if she made the statements the government already had recorded, without fair warning of the trap she was being led into is not permissible prosecutorial conduct.[5] Had the questions served some useful investigatory function, the conclusion might be otherwise. But no suggestion has been made to the court that such a purpose lay behind the question, and the court must agree with defense counsel's assessment that the questions which led to

[4] Further, the government's own brief (at 12) admits that the grand jury was presented with sufficient independent identity evidence.

[5] See *United States* v. *Washington*, 328 A. 2d 98, 100 (D.C.C.A. 1974), which found the failure to advise the defendant that he was a potential defendant contravened Standard 3.6(d) of the ABA Project on Standards for Criminal Justice, The Prosecution Function. That section provides: "If the prosecutor believes that a witness is a potential defendant he should not seek to compel his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advice concerning his rights."

the alleged perjurous responses served *no other function* than to give the government an additional prop on which to base its case against defendant.

The court therefore sees no reason why the result reached in *Mandujano* should not control here. The *Mandujano* court simply concluded that the prosecutorial conduct involved was "so 'offensive to the common and fundamental ideas of fairness' as to amount to a denial of due process." 496 F. 2d at 1059. We have reviewed the authorities cited by the government which are said to suggest a contrary result. None of the cases cited suggests either that no grand jury questioning of a putative defendant can ever amount to a deprivation of due process[6] or that due process should not be tested in such cases by an appraisal of *all* the relevant facts and circumstances.

On such an appraisal, the court concludes that the entire grand jury proceeding was a violation of Jacobs' due process rights under the Fifth Amendment. Consequently, all her grand jury testimony

[6] See, *e.g.*, *United States* v. *Corrallo*, 413 F. 2d 1306 (2 Cir.), *cert. denied*, 396 U.S. 958 (1969), in which warnings that the defendants were subjects of the investigation were given. *Id.* at 1328 & 1329 n.6. In *United States* v. *Winter*, 348 F. 2d 204 (2 Cir.) *cert. denied*, 382 U.S. 955 (1965), the court found a much clearer legitimate interest in the defendant's being summoned before the grand jury. *Id.* at 208. In *United States* v. *Scully*, 225 F. 2d 113 (2 Cir.), *cert. denied*, 350 U.S. 897 (1955), it was far from clear that Scully was "marked for prosecution." *Id.* at 114.

The government's other cited authorities are either similarly inapposite or support the conclusion reached here. *E.g.*, *United States* v. *Luxenberg*, 374 F. 2d 241, 246 (6 Cir. 1967), citing *Stanley* v. *United States*, 245 F. 2d 427, 434 (6 Cir. 1957), both cited by the government, states that "a person who is virtually in the position of a defendant must be accorded the same rights as a defendant."

must be suppressed and the perjury count, being based solely upon such testimony, must be dismissed.

The defendant's various motions to dismiss are otherwise denied in accordance with the views expressed by the court at oral argument. Discussion of any other outstanding matters is reserved for September 18, 1975, at 10:00 a.m., at which time a prompt date for trial of the indictment will be set.

So ordered.

/s/ EDWARD A. NEAHER,
U.S.D.J.

Dated: Brooklyn, New York, July 21, 1975.

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U.S. GOVERNMENT PRINTING OFFICE: 1977